RAZALI HAMZAH

v.

PP

HIGH COURT MALAYA, MUAR
JEFFREY TAN J
[CRIMINAL APPEAL NO: 44-111-2001]
5 AUGUST 2002

CRIMINAL LAW: *Penal Code - Section 354 - Using criminal force with intent to outrage modesty - Ingredients of offence - Proof - Whether prima facie case made out - Whether accused properly convicted - Sentence of 30 months' imprisonment - Whether adequate - Penal Code, s. 354*

EVIDENCE: *Identification parade - Conduct of - Accused in handcuffs seen by complainant prior to identification parade - Whether identification evidence thereof bad in law - Whether unreliable - Whether would vitiate subsequent identification in court - Penal Code, s. 354*

EVIDENCE: *Identification evidence - Identification in court - Corroboration - Outraging modesty - Assailant vividly described and positively identified in court by complainant - Identification evidence thereof - Whether could stand alone - Whether needed to be corroborated - Penal Code, s. 354*

The appellant had appealed against his conviction and sentence in respect of an offence under s. 354 Penal Code, for using criminal force on the complainant with intent to outrage her modesty. The evidence as adduced by the prosecution showed that on the day in question, the complainant had taken a ride in the appellant's car on her way from Parit Sulong to Muar town, that twenty minutes into the journey the appellant drove the car into a banana plantation, and that in the ensuing struggle outside the car the appellant molested the complainant and poked a finger into her private part. In the appeal, arguments were however put forth that the conviction was unsustainable as: (i) there was no corroboration of the complaint, the complainant being the sole eyewitness; (ii) the identification parade evidence was wanting as the complainant had seen the appellant in handcuffs before the parade was conducted; and (iii) the bad identification parade evidence had rendered the appellant's identification in court valueless.

The prosecution argued that the conviction ought to be upheld as the trial magistrate, in convicting the appellant, and ruling out any doubt as to the appellant's identity, had rightly and properly taken into consideration, *inter alia*, the ample time the complainant had to observe the face of the accused, the testimony of SP1, the medical officer, who detected a still bleeding fresh hymen tear on the external genital as well as abrasion wounds and haematoma on the right shoulder and arm of the complainant just three hours after the alleged incident, the respective recoveries by SP2 and SP5 of the complainant's spectacles and black bag at the alleged scene, and the fact that the appellant, when called upon to enter his defence, had chosen to remain silent. Before the learned judge, the main issues that arose were: (i) whether the identification parade evidence herein was bad in law; (ii) if so, whether such evidence had rendered useless the identification evidence in court; and (iii) whether in any case the conviction was vitiated by miscarriage of justice.

Held:

[1] It should perhaps be accepted that the identification parade evidence was bad, as the appellant in handcuffs was seen by the complainant before she identified him at the identification parade. However, it does not follow that a conviction can only be sustained if there is also identification parade evidence. Identification in court may stand on its own. (pp 186 e & 187 a)

[1a] An identification parade is not obligatory and whether it is necessary to conduct one depends on the circumstances of each case. And, while the failure to conduct an identification parade may in certain circumstances render the identification evidence of the eyewitness suspect, it is not in every failure that the probative value of an eyewitness' evidence is adversely affected. Ultimately, it is the quality of an eyewitness' evidence that ought to be assessed. (p 187 d)

[2] Since an earlier identification proceeding is not obligatory, there cannot be a rule that identification in court must be corroborated by some evidence of some earlier identification. If the identification parade evidence is bad, then no reliance can be placed on such evidence. That however is not to say that the identification in court is of no value whatsoever if the identification parade evidence is bad. The fact of the matter is that, once factum of the alleged offence was established, there was no requirement for the identification of the appellant to be corroborated. (pp 189 b-c & 190 c)

[3] The factum of the offence was corroborated by the evidence of SP1, SP2 as well as SP5. The evidence of SP1 was consistent with the use of criminal force, whilst that of SP5's, especially the part in which he described the hair and clothes of the complainant when he first saw her at 2.45pm that day as being 'tidak teratur', was consistent with a physical struggle. Considering these evidence in their totality, the conclusion has to be, even on a beyond reasonable doubt basis, that the complainant was indeed molested against her will. In the circumstances, the finding of the trial court that the factum of the offence was corroborated by SP1's medical evidence and by SP5's evidence of the physical appearance of the complainant when she was at Bakri police station was entirely supported by evidence. (pp 190 g-i & 191 a-e)

[4] The identification in court was more than just the case of the complainant pointing to the accused in the dock. The complainant had given a vivid description of her assailant, and the description given had fitted the appellant. Consequently, there was no reason for this court to argue with the finding of the trial court who, in its grounds, made it obvious that it was aware of the danger of mistaken identity. There was also no reason to argue with the finding that there was a *prima facie* case. (pp 193 a & 193 e)

[5] Given the facts and circumstances, the conviction is not unsatisfactory or unsafe. This was not a case in which the witness' ability to make identification was or could be in doubt, notwithstanding that the identification parade evidence was bad. Guilt had been proved beyond reasonable doubt and there was no miscarriage of justice. Further, the sentence of 30 months' imprisonment is not one that is inappropriate or excessive. (p 194 d-e)

[Appeal against conviction and sentence dismissed.]

Case(s) referred to:
Ang Jwee Herng v. PP [2001] 2 SLR 474 ***(refd)***
Arulpragasan Sandaraju v. PP [1996] 4 CLJ 597 FC ***(refd)***
Arumugam v. PP [1998] 3 CLJ 597 FC ***(refd)***
Awtar Singh Margar Singh v. PP [2000] 3 SLR 439 ***(refd)***
Chang Kim Siong v. PP [1968] 1 MLJ 36 ***(refd)***
Din v. PP [1964] MLJ 300 ***(refd)***
Loh Kim Lan & Anor v. PP [2001] 1 SLR 552 ***(refd)***
Looi Kow Chai & Anor v. PP [2003] 1 CLJ 734 CA ***(refd)***
Low Thim Fatt v. PP [1989] 1 MLJ 304 ***(refd)***
Ong Poh Cheng v. PP [1998] 4 CLJ 1 CA ***(refd)***
PP v. Mohamad Majid [1977] 1 MLJ 121 ***(refd)***
PP v. Pasupathy Kanagasaby [2001] 2 CLJ 753 CA ***(refd)***
R v. Turnbull [1977] QB 224 ***(refd)***
S v. Maheswar, A 1964 Or 37 ***(refd)***
Sharif Kasmani v. PP [1997] 275 MLJU 1 ***(refd)***
Vaikuntam v. S, A [1960] SC 1340 ***(refd)***

Other source(s) referred to:
Sarkar's Law of Evidence, 14th edn, p 173

For the appellant - S Bala Sekaran (Anita Vijaya Rajah); M/s Bala & Co
For the respondent - Haslinda Abu Bakar; DPP

Reported by WA Sharif

JUDGMENT

Jeffrey Tan J:
This is an appeal by the accused (appellant) against his conviction and sentence by the Muar Magistrate's Court for the following offence.

> Bahawa kamu pada 23 hb. February 1998 jam lebih kurang 2.00 petang bertempat di dalam kawasan kebun pisang Bt 13 Jalan Air Hitam, dalam Daerah Muar, didalam Negeri Johor, telah menggunakan kekerasan jenayah kepada seorang perempuan nama Norzitah bte Abu Khair KPT: 720823-01-5680 umur 24 thn dengan niat hendak mencabul kehormatannya, maka dengan itu kamu telah melakukan satu kesalahan yang boleh dihukum di bawah Sek. 354 Kanun Keseksaan.

Briefly stated, the case against the accused, as revealed in the appeal record, may be paraphrased as follows. The complainant (SP6) testified that whilst she was waiting for her bus at Parit Sulong, she accepted a lift to Muar, from the accused (whom she identified) who gestured to her to ride in his red car, an old car of registration number BBC and of the Datsun or Toyota marque. She got into the car and sat in the front passenger seat, ie, next

to the accused who was the driver and sole occupant of the car. The accused was a stranger. Inside the car, the accused informed her that he was a resident of Parit Tegak and was working at the Muar Police Station. At the 13th milestone Jalan Air Hitam, the accused turned into a side road. She asked the accused, where he was going. The accused replied, to fetch a friend. The accused drove to an oil palm estate, then to a rubber estate and then to a banana plantation. Again she asked the accused, where he was going. That time the accused remained silent. The car stopped at a place full of undergrowth. When the car had stopped, she opened the car door and ran. The accused gave chase. She fell and her veil (tudung) fell off her head. The accused caught hold of her (kemudian dia pegang badan saya). She tried, but she could not push away the accused and she could not run away. The accused entered something into her vagina. At that moment, she was "dalam keadaan mengiring. Kedudukan OKT saya rasa dia berdiri. Dia tolak saya. Saya terjatuh dan cuba bangun balik dan dia cuba pegang saya. Dia menyelak kain saya. Dia menyelak kain saya dalam keadaan saya dan OKT berdiri. Dia masukkan sesuatu ke dalam kemaluan saya dalam keadaan berdiri itu. Selepas itu orang itu lepaskan saya. Dan saya lari. Kemudian dia kejar saya balik. Separuh jalan dia patah ke kereta ... Dia keluarkan semua barang saya dalam kereta ... beg saya dibuang daripada kereta dia kata saya bodoh. Dia bawa kereta ke hujung pokok getah. Selepas kereta itu pergi jauh, saya bersembunyi di seberang kebun sebab saya takut dia datang lagi. Selepas itu saya dengar kereta berbunyi dan patah balik ke tempat ia mula-mula berhenti. Selepas beberapa ketika dia pun pergi meninggalkan kebun getah. Bila saya rasa tidak ada orang saya keluar dari tempat saya sembunyi dan saya keluar ke jalan besar ... lepas itu orang bawa saya ke Balai Polis Bakri. The complainant gave the following description of the person who attacked her: Bentuk fizikal orang itu mukanya panjang, mata besar, kulit hitam manis, rambut macam stail askar macam rekrut baru potong pendek, alis mata lebat hitam". The complainant also related that the accused was wearing a green army-style trousers and a chocolate-coloured t-shirt. At an identification parade held on 5 September 1998, she identified the accused. She had not permitted the accused to touch her. She tried to stop the accused from doing so. At the Bakri Police Station, she met SP2 and then SP5. P2 was her police report. She led SP5 to the place of the incident. She was sent to the hospital for examination. The police recovered her bag. During the incident she dropped her spectacles.

Under cross-examination, the complainant testified that the accused waved and gestured with his hand to her that he was on his way to Muar. She crossed over to the other side of the road, where the accused had stopped his car. The accused invited her to enter his car. She entered the car of her own free will. Inside the car, "saya tanya and tengok muka dia. Jadi saya memang cam dia". The accused was a stranger. That was the first time she had ever entered the car of a stranger. When she first saw the car of the accused, it seemed to her to be the car of one of the residents of her village – Parit Tegak. She disagreed with counsel who suggested that she did not know the accused and therefore could not identify the accused. "Saya cam muka dia." Asked by counsel to explain why she could identify the accused, the complainant gave the description of her assailant as follows: bentuk muka dia, mata besar, alis hitam, warna kulit kehitaman, rambut cutting recruit pendek, muka bujur, kat muka dia tahi lalat tak banyak, saya tak ingat, saya tak pasti ada parut ke tidak" (see p. 38 of the Appeal Record). She agreed with counsel who suggested that the aforesaid description would also fit other persons. Counsel suggested that "awak cuma rasa OKT yang pandu kereta itu dan bukan 100% dia". The complainant maintained "Saya pasti OKT', The complainant also related that the journey to the 13th milestone Jalan Air Hitam from where she boarded the car took about 20 minutes. The oil palm estate, rubber estate, and banana plantation were all on the same side of the road but in different areas. The distance between the banana plantation and main road was about 30 meters. She did not see anyone else in the rubber estate. She maintained that the events related in her police report were all true. "Dia pegang saya di luar kereta ... dia pegang saya and tarik tudung saya. Saya cuba tolak masa dia pegang saya. Dia seboleh mungkin untuk selak kain saya. Saya tidak ingat semasa dia cuba pukul saya. Masa dia tarik tudung dan tercabut, dia kejar saya. Selepas itu dia pegang saya dan masa itu terasa ada sesuatu dimasukkan ke dalam kemaluan saya ... tangan yang digunakan masuk ke kemaluan saya, saya tidak nampak samada kiri atau kanan. Saya rasa, dia masukkan jari tapi saya tidak tahu jari yang mana (see p. 40 of the AR). Disagreeing with counsel who put to her that she had imagined the events, the complainant said that the offence took place on the 23rd, and that about seven months after the incident, ie, sometime in September, she was called upon to identify her assailant. "Sebelum saya masuk bilik kawad cam, saya setuju ada nampak OKT digari (see p. 40 of the AR)." She agreed with counsel who suggested "ketinggian ahli-ahli kawad tak sama (see p. 41 of the AR). But the complainant said that the height and skin colour of the identification parade participants were more or less the same, and that the participants were all Malays.

Under re-examination, the complainant testified that she entered the car in the belief that it was a car of one of the residents of her village. "Warna kereta itu nampak macam warna kereta orang kampung saya ... Saya boleh cam pemandu itu tanpa deskripsi yang dikenalkan kepada OKT. Tiada orang lain yang sama seperti deskripsi yang di kenalkan kepada OKT'. Before the identification parade was conducted, she was inside a room and she saw accused outside the room. Some of the participants of the identification parade could have been of different ethnicity. "Proses pengecaman lebih kurang 10 minit. Saya boleh cam OKT apabila diminta untuk mengecam. Apabila disuruh buat cam, saya ambil masa lebih kurang 5 minit."

On recall, the complainant testified that she could identify the car in question, and in the event identified the car (P7) produced by the prosecution. The complainant also identified the spectacles produced by the prosecution (see p. 45 of the AR). The complainant further said that even had she not attended the identification parade she could identify the accused. Under cross-examination on recall, the complainant testified that before the trial, the police only produced a single car for her identification. Under re-examination on recall, the complainant testified that it was SP2 who recovered her spectacles, when SP2 was with her at the place of the incident.

SP2 (Police Sergeant Hadijah bte Adam) testified that at 3.45pm on 23 February 1998 she was instructed by SP5 to interview the complainant who complained she had been molested by a male of Malay descent. After she had interviewed the complainant, she recorded the police report of the complainant. SP5 instructed her to send the complainant to the hospital for medical examination. Together with SP5 and a police photographer, she proceeded to the scene, which was a banana plantation. At the scene (see P3B), she recovered the spectacles of the complainant. "Dalam (P3B) terdapat kesan pengelutan dimana pokok-pokok dan rumput rebah. Seterusnya saya rakamkan rajah kasar dan mengarahkan jurugambar ambil gambar. Selepas itu saya terus balik ke Balai Polis Muar." On 1 September 1998, SP5 informed her that a Malay male had been arrested and that a red Toyota Corolla bearing registration BBC 7714 had been taken into possession. The complainant identified that car as the car in question. Inspector Rashid conducted the identification parade. Under cross-examination, SP2 testified that the complainant was not present when she was at the scene. Earlier, the complainant had led SP5 to the scene. The complainant did not inform her that there was a struggle on the ground. She recovered the spectacles at the scene. She showed those spectacles to the complainant who said they belonged to her. The identification parade was conducted at the junior officers' mess, which was about 30 meters from

the lockup. Under re-examination, SP2 testified that the complainant was first at the Bakri Police Station and met with SP5, and then was at the Muar Police Station. SP5 was the officer-in-charge of the Bakri Police Station. SP5 and the complainant were first at the scene before they proceeded to the Muar Police Station. She was at the scene after the complainant and SP5 had been there. Whilst she and SP5 were at the place of the incident, the complainant was at the hospital.

SP4 (Detective Corporal Ismail bin Mohd.) testified that on 27 August 1998 he was instructed to carry out an arrest at the Mahkota Camp, Kluang. He arrested one Razali bin Hamzah, the holder of army identification card number (T) 1089429. He took into possession a red Toyota Corolla bearing registration BBC 7714. Under cross-examination SP4 testified that he carried out the arrest pursuant to Bakri Report 795/98.

SP5 (Teo Keng Tee – a retired policeman) testified that on 23 February 1998 he was the officer-in-charge of the Bakri Police Station. On that day, at about 2.45pm, the complainant came to his station and informed him that a male of Malay descent had attempted to rape her. Inspector Suraya instructed him to bring the complainant to the Muar Police Station to meet with her (Inspector Suraya). Together with the complainant and Sergeant Mohamed Hafiq, he then proceeded to the scene. They left the station at about 2.55pm. They reached the scene at about 3.20pm. That place was full of undergrowth. It was in an oil palm estate and also grown with banana trees. The complainant indicated the place of the struggle with her assailant.

About 10 feet away from that place, was a black bag containing some clothes and an umbrella. He handed those things to the complainant who said they belonged to her. They were there for about 10-15 minutes. They then proceeded to the Muar Police Station. The clothes and hair of the complainant, when he first saw her, were in an untidy state (tidak teratur). After he handed the complainant to Inspector Suraya, he and SP2 proceeded to the place of the incident. He pointed out the place of the incident to SP2. Under cross-examination, SP5 disagreed with counsel who suggested that the complainant first approached SP2 and not him.

On the basis of that evidence, the trial court held that there was a *prima facie* case, and ordered the accused to enter his defence. The accused elected to remain silent, but called his father (SD1) to take the witness stand. Basically, SD1 testified that the car in question belonged to him, that many

persons could have used his car on 23 February 1998, and that he was not sure if the accused was the user of the car at about the material time of the alleged offence.

Mr. S. Bala Sekaran for the appellant submitted that "the identification of the accused in court should not have been accepted. There was no corroboration of the complaint. At p. 111 of AR (line 2) the trial court held that the identity of the assailant was proved beyond reasonable doubt. The trial court was wrong to do so without hearing the defence first. At p. 108 of the AR, the trial court again pre-judged the first ingredient of the offence before hearing such evidence towards such a finding. The identification evidence was bad. The complainant saw the accused in handcuffs before the identification parade was conducted. "Having seen the accused at the identification parade, the identification in court was of no value." Mr. Bala tendered the cases of *Low Thim Fatt v. PP* [1989] 1 MLJ 304, and *Chang Kim Siong v. PP* [1968] 1 MLJ 36. "The medical evidence was not consistent with the alleged crime. The doctor agreed that the tear could have been self-inflicted." The doubt should have been given to the accused. "There was no evidence on the identity. There was no case to answer. At the end of the day, the charge not was proved beyond all reasonable doubt. A woman can simply accuse, but where was the proof? Why should the accused answer? There must be corroboration of identification." Learned counsel then referred to *PP v. Mohamad bin Majid* [1977] 1 MLJ 121. Nothing incriminating was found on the accused. In the absence of corroboration of the identification, no *prima facie* case was proved.

Miss Anita Vijaya Rajah (with Mr. Bala) added that the prosecution had not proved that the assailant was the accused beyond a reasonable doubt. Learned counsel tendered the case of *PP v. Pasupathy s/o Kanagasaby* [2001] 2 CLJ 753. She said that there was evidence from the defence. At the end of the case, the trial court must re-evaluate the case in totality. Where an accused was seen by the complainant before the trial, the identification in court is valueless. As authority for that proposition, learned counsel referred to *Sarkar's Law of Evidence* 14th edn at p. 173. There was no evidence that the complainant gave a description of the car to the police. A red car is a common car.

The learned DPP, Miss Haslinda bte Abu Bakar, answered that at p. 108 of the AR, the trial court was making its findings at the close of the prosecution case. "The identification of the accused could not be doubted. The complainant had ample time to observe and see the face of the accused." The trial court found that the identity of the accused was proved

on a beyond a reasonable doubt basis. There was corroborative evidence. The complainant testified that the car was an old red car bearing registration number BBC and of the Datsun or Toyota marque. The complainant testified that she could identity the car, and later identified the car. Page 46 of the AR is the transcript of the evidence of the complainant giving a description of the car to the police. The accused was arrested together with the car. Corroboration is only required with regard to the offence and not identification. The learned DPP then tendered the case of Din v PP [1964] MLJ 300. Identification was good. On the latter contention, the learned DPP tendered the case of *Arumugam v. PP* [1998] 3 CLJ 597.

Mr. Bala replied that there must be corroboration that it was the accused who committed the offence. The identification of the car had no probative value, as only one car was shown to the complainant. "The natural instinct would be to identify the car shown." There was no *prima facie* case. The defence should not have been called.

The main thrust of this appeal appears to be of one of mistaken identity and or that the identity of the assailant had not been not proved beyond all reasonable doubt, given the submission as that "there must be corroboration of identification ... the identification evidence was bad ... the identification in court was of no value". Perhaps it should be accepted that the identification parade evidence was bad, as the accused in handcuffs was seen by the complainant before she identified the accused at the identification parade. But in the instant case, the complainant positively identified the accused in the dock as the assailant. But could it be that identification evidence in court is of no value merely on account that the identification parade evidence was bad, wanting or even not present? two questions were raised in *Arumugam s/o Muthusamy (supra)* to the Federal Court. The 1st question was "whether dock identification in court after a long lapse of time without holding an identification parade can be sufficient basis for a conviction". The Federal Court answered, "it depends on the particular facts and circumstances of the case": per Chong Siew Fai CJ (Sabah & Sarawak). But interestingly, in answering the 1st question, the Federal Court held "that to hold that an identification parade must, in all circumstances, be conducted in order to sustain a conviction would be too stringent", and that "there may well be situations where an identification parade cannot or need not be held, for example, where the attendance of the witness at the parade is physically impossible or impracticable or there are exceptional circumstances". In other words, non sequitur, it does not follow, that a conviction can only be sustained if there is also identification parade

evidence. Identification in court may stand on its own. "The substantive evidence of a witness is his statement in court; but the purpose of identification is to test that evidence and the safe rule is that the sworn testimony of witnesses in court as to the identity of the accused who are strangers to the witnesses, generally speaking, requires corroboration which should be in the form of an earlier identification proceeding. Where disinterested eye-witness picks out nine persons out of 46 making three correct identifications and six mistakes, no reliance can be placed on such identification (*Vaikuntam v. S, A* [1960] SC 1340; [1960] Cr LJ 1681). The exception to this rule of corroboration by an earlier identification is where the court can safely rely on it without previous identification (*S v. Maheswar, A* [1964] Or 37)" (*Sarkar's Law of Evidence ibid* p. 172).

Hence, an identification parade is not obligatory. Whether it is necessary to conduct an identification parade depends on the circumstances of each case (*Awtar Singh s/o Marqar Singh v. PP* [2000] 3 SLR 439). "While the failure to conduct an identification parade may in certain circumstances render the identification evidence of the eyewitness suspect, it is not every failure which adversely affects the probative value of an eyewitness' evidence. Ultimately, the quality of an eyewitness' evidence ought to be assessed in accordance with the guidelines laid down in *R v. Turnbull* [1977] QB 224 ..." (*Loh Kim Lan & Anor v. PP* [2001] 1 SLR 552 per Yong Pung How CJ). "... a holistic has to be adopted in order to ascertain the reliability of the evidence which has in turn to be assessed in the context of all the surrounding circumstances" (*Ang Jwee Herng v. PP* [2001] 2 SLR 474 per Yong Pung How CJ).

As for the guidelines in *R v. Turnbull*, they are the following:

> (a) First, whenever the case against the accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken the judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. In addition he should instruct the jury as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Provided this is done in clear terms the judge need not use any particular form of words. ...
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> (b) Secondly, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any

way, as for example, by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first see by them and his actual appearance?

(c) Finally, he should remind the jury of any specific weaknesses which had appeared in the identification evidence.

Saying that the aforesaid matters go to the quality of the identification evidence, Lord Widgery a at pp. 552-554 further said:

If the quality is good and remains good at the end of the close of the accused's case, the danger of a mistaken identification is lessened; but the poorer the quality, the greater the danger. In our judgment, when the quality is good, as for example when the identification is made after a long period of observation, or in satisfactory conditions, by a relative, a neighbour, a close friend, a workmate and the like, the jury can safely be left to assess the value of the identifying evidence even though there is no other evidence to support it; provided always, however, that an adequate warning has been given about the special need for caution ...

When, in the judgment of the trial Judge, the quality of the identifying evidence is poor, as for example when it depends solely on a fleeting glance or on a longer observation made in difficult conditions, the situation is very different. The Judge should then withdraw the case from the jury and direct an acquittal unless there is other evidence which goes to support the correctness of the identification. This may be corroboration in the sense lawyers use that word; but it need not be so if its effect is to make the jury sure that there has been no mistaken identification ...

The trial judge should identify to the jury the evidence which he adjudges is capable of supporting the evidence of identification. If there is any evidence or circumstance which the jury might think was supporting when it did not have this quality, the judge should say so. A jury, for example, might think that support for identification evidence could be found in the fact that the accused had not given evidence before them. An accused's absence from the witness box cannot provide evidence of anything and the judge should tell the jury so. But he would be entitled to tell them that when assessing the quality of the identification evidence they could take into consideration the fact that it was uncontradicted by any evidence coming from the accused.

...

> A failure to follow these guidelines is likely to result in a conviction being quashed and will do so if in the judgment of this court on all the evidence the verdict is either unsatisfactory or unsafe ...

Obviously there is no rule that identification in court must be corroborated by some evidence of some earlier identification out of court. The fact of the matter is that since an earlier identification proceeding is not obligatory, it follows that there cannot be a rule that identification in court must be corroborated by some evidence of some earlier identification. If the identification parade evidence is bad, then no reliance can be placed on such evidence (*Vaikuntam v. S, A* [1960] SC 1340; [1960] Cr LJ 1681) or such evidence cannot be considered (*PP v. Pasupathv s/o Kanagasaby*). But that is not to say that the identification in court is of no value whatsoever if the identification parade evidence is bad. Other evidence could support the correctness of the identification in court. "It does not follow, as a matter of course, that just because the trial judge rejected the identification at the identification parade, he must necessarily also reject the dock identification ... Generally speaking, an identification at an identification parade, held usually a short time after the incident, would tend to strengthen the prosecution's case but it does not follow that the lack of it would be fatal, or would destroy a court or dock identification ..." (*Ong Poh Cheng v. PP* [1998] 4 CLJ 1 per Shaik Daud JCA). In sexual offences, "the desirability for corroboration of the evidence of the prosecutrix ... springs not from the nature of the witness but from the nature of the offence. Never has it been suggested that the evidence of a woman as such calls for corroboration. If a woman says her handbag has been snatched and if she is believed there can be no question of a conviction on such evidence being open to attack for want of corroboration. If however, she complains of having been raped then prudence and practice demand that her evidence should be corroborated. Here, however the necessity for corroboration, generally speaking, is not so imperative with regard to the identity of her assailant as to the fact of the offence itself. It is here that there is danger. The temptations of a woman to exaggerate an act of sexual connection are well known and manifold. But though it might be dangerous to find the factum of rape on the uncorroborated evidence of the prosecutrix once that factum of rape is established there seems to be nothing left to support the view that her identification of the assailant calls for corroboration any more than it would in relation to any other type of offence" (*Din v. PP supra*, at 301-302: per Thompson LP). "There is no rule which requires the quashing of a conviction when evidence has been admitted of identification from photographs, and an identity parade could have been held, but was not. The proper approach is to consider whether the conviction can safely be sustained on the whole of the evidence" (*Alexander v. R* 34 ALR 289).

The rule is caution and prudence, and not that identification in court must be corroborated by evidence of some earlier identification. The submission that identification in court must be corroborated by some earlier identification is devoid of all merit. The submission that there must be corroboration that it was the accused who committed the offence, if by that it was meant that one other witness must corroborate the complainant's identification, cannot be valid, for if that is the case "then it would logically mean that an accused could never be convicted on identification evidence alone if there was only one witness to the offence, which surely cannot be the case" (*Ang Jwee Herng v. PP supra,* per Yong Pung How CJ). Once the factum of the alleged offence was established, there was no requirement for the identification of the appellant to be corroborated (*Din v. PP* applied).

The submission that the trial court, at p. 111 of the AR, was wrong to come to the finding that the identity of the assailant was proved beyond reasonable doubt "without hearing the defence first" also says that the trial court's grounds of judgment was not appreciated. The trial court had carefully separated its grounds of judgment into three main parts: pp. 103-113 is the part on the prosecution case and findings of the trial court at the close of the prosecution case, while pp. 113-115 is the part on the defence; pp. 115-117 is the last part, on the sentence. And at p. 111 of the AR, as the learned DPP was quick to point out, the trial court was at the stage of the evaluation of the prosecution case for to find if a *prima facie* case has been made out. And of course, at that stage, at the close of the prosecution case, the trial court must necessarily make its findings "without hearing the defence first". The trial court could not call for the defence without a prior evaluation of the prosecution evidence and without it being first satisfied that the ingredients of the offence had been proved and that a *prima facie* case had been made out. There is just no merit in the submission that the trial court had "pre-judged the issue".

Was the factum of the offence established? The complainant alleged that she was sexually molested. Could it be that the complainant could have exaggerated the act of sexual connection or could have imagined the entire episode altogether? Well, SP1, a government medical officer, testified that when she examined the complainant at the Muar Hospital on 23 February 1998 at 4.50pm, and that she detected a still bleeding fresh hymen tear on the external genetalia of the complainant. SP1 also related that she found abrasion wounds and haematoma on the right shoulder and arm of the complainant. So, the medical evidence – a still bleeding fresh hymen tear, abrasion wounds and haematoma on the right shoulder and arm, which are consistent with criminal force – surely corroborated the factum of the offence. On the matter of the consistency of the complainant's story, SP1

testified that the complainant informed her that she (complainant) "diserang oleh seorang yang tidak dikenali pada jam 2pm pada hari yang sama ... bahawa bahagian kemaluannya dicederakan oleh lelaki tersebut". SP2 testified that SP5 informed her that complainant complained that "dia telah di cabul oleh seorang lelaki Melayu". SP5 testified that the complainant came to his station and informed him "seorang lelaki Melayu yang tidak dikenali cuba merogolnya di lorong dalam semak Bt 13, Jalan Parit Sulong, Bukit Naning, Muar". So, the complainant was consistent in her story, both in and out of court. SP2 testified that at the alleged scene, she recovered the eyeglasses of the complainant. SP5 testified that at the alleged scene, he recovered a black bag containing the clothes and umbrella of the complainant. SP5 also related that the hair and clothes of the complainant, when he first saw her at 2.45pm, were "tidak teratur". So, there was evidence consistent with a physical struggle. And when all the aforesaid are considered in totality, the conclusion has to be, even on a beyond reasonable doubt basis, that the complainant was indeed molested against her will. Given the weight of the evidence, the factum of the offence could not be doubted. Therefore, the finding of the trial court was that the factum of the offence was corroborated by SP1's medical evidence and by SP5's evidence of the physical appearance of the complainant when she was at the Bakri police station (see p. 110 of the AR) was entirely supported by the evidence.

But there is merit in the submission that the identification parade evidence was bad. The prior identification evidence should not have been considered. But the trial court was aware that the identification parade evidence was imperfect. The trial court, in its grounds of judgment, made that adequately clear:

> Sedikit sebanyak proses kawad cam yang dijalankan ke atas Tertuduh telah berlaku sedikit kecacatan. Pihak polis tidak sepatutnya memberi sebarang peluang kepada Pengadu yang akan membuat kawad cam ke atas penyerang beliau melihat Tertuduh di dalam keadaan bergari sebelum proses itu bermula. Apabila Pengadu melihat seseorang yang digari dibawa masuk ke bilik kawad cam, sudah tentu terfikir di fikiran Pengadu bahawa inilah orang yang berjaya ditangkap polis dan pada masa yang sama Pengadu mempunyai masa mengumpul semula memori pada masa kejadian dan memadankan fizikal orang yang digari dengan orang yang menyerang beliau semasa kejadian (see page 113 of the AR).

The identification parade evidence was bad. But was the identification in court also bad? What was the quality of the identification in court? The circumstances in which the identification by the complainant came to be made, were the following. First, the complainant had her assailant under observation for the entire duration of time of the journey to the 13th milestone, ie, for 20 minutes. Secondly, the complainant was just seated next to her assailant for about 20 minutes. Thirdly, the observation could not have been impeded in any way. Fourthly, at about 2pm, the light condition would have been good, if not extremely good. Suffice it to say that those circumstances favoured observation of the facial features of the assailant. Fifthly, the complainant also had her assailant under observation, after she had freed and then hidden herself. Hence, the identification was made after a long period of observation, and mostly at close range. Given so, the quality of the identification would have been good. And those circumstances (time, distance, and light) were clearly noted by the trial court who observed "beliau di dalam kereta dan duduk di bahagian penumpang sebelah pemandu selama 20 minit telah mempunyai masa yang mencukupi untuk observe the features of the assailant". In fact, other circumstances were in addition noted by the trial court ... Tambahan pula, semasa di dalam perjalanan di dalam kereta berlaku perbualan antara pengadu dan lelaki tersebut ... Semasa di dalam kereta juga pengadu telah mengamati muka lelaki tersebut dan kemudiannya menyedari bahawa lelaki itu bukanlah yang beliau kenali dan kereta yang beliau naiki bukannya kereta kepunyaan orang kampung beliau ... emosi pengadu ketika itu adalah stabil dan tenang ... Ketika itu tiada apa yang perlu ditakuti oleh beliau kerana kereta bergerak di atas jalan besar dan menuju destinasi yang dihendaki pengadu. Ini ditambah dengan representasi lelaki tersebut kepada pengadu bahawa beliau adalah seorang polis yang bertugas di Balai Polis Muar. Pengadu tidak dalam situasi kalam kabut atau ketakutan. Kesempatan ini membolehkan pengadu dapat mengecam tertuduh dengan lebih jelas dan menyakinkan."

Hence, the finding of fact that the complainant had positively identified the appellant was reached with the *R v. Turnbull* guidelines in mind. Definitely it could not be said that the trial court had mechanically accepted the identification in court. The identification in court was accepted after due assessment of the circumstances, and because of the ability of the complainant to relate the facial features of her assailant – "keterangan pengadu lebih menyakinkan apabila beliau dapat mengingati keadaan bentuk physical lelaki yang menyerang dia. Beliau berkata: bentuk physical orang itu, rambut macam stail askar macam rekrut baru potong, muka panjang, kulit hitam-hitam, pendek, alis mata lebat hitam". So, there should be no question about it. The identification in court was certainly more that just

the case of the complainant pointing to the accused in the dock. The complainant had given a vivid description of her assailant, something that most complainants in most cases, if even called upon, might not be able to do. According to the trial court, the description given by the complainant fitted the appellant. Well, at least it could be said that the complainant's description of the hairstyle of her assailant – rambut macam stail askar macam rekrut baru potong ... pendek rambut cutting recruit pendek - was consistent with the unchallenged and established fact that the accused was a soldier at the material time, and which must go some way to say that the complainant would not have not been an inattentive witness. Otherwise how could the complainant have reported to the police that her bag was thrown out from the car, a fact she testified thereto and a fact corroborated by SP5 who testified that he found the bag at the scene. The complainant must have been fairly observant. She reported that the car in question was a red car, and true enough the car taken into possession was a red car, and a red car with a nexus to the accused at that. And that red car was identified by the complainant as the car in question. The trial court held that the complainant had "indelibly and positively identified" the appellant "in a manner which was assertive and unfaltering". In truth, *testimonia ponderanda sunt*, the complainant was weighed most carefully. There is no reason to argue with the finding of the trial court, who in its grounds made it obvious that it was aware of the danger of mistaken identity. There was also no reason to argue with the finding that there was a *prima facie* case. Quite clearly the prosecution had proved the alleged offence and made out a case that the appellant was the perpetrator. Defence was rightly called. But the appellant elected to remain silent.

In *Arulpragasan a/l Sandaraju v. PP* [1996] 4 CLJ 597, it was held by the Federal Court, per Wan Adnan FCJ as he then was, that an accused who has been called to enter his defence but offers no evidence in rebuttal would be convicted on the evidence adduced by the prosecution. In *Looi Kow Chai & Anor v. PP* [2003] 1 CLJ 734, the Court of Appeal per Sri Ram JCA put the present position as follows:

> With the demise of *Arulpragrasan*, personally I am of the view that one may depart from the position adopted in that case to convict an accused who chooses to remain silent forthwith at the close of the case for the prosecution – to re-examine the prosecution's evidence afresh to see if in the final analysis the charge against the accused has been proved beyond reasonable doubt. For in my considered view, s. 180 in its present form (without the phrase 'if unrebutted would warrant his conviction') merely requires the court to decide whether the prosecution has made out a *prima facie* case at the close of its case. All that the judge needs to do at this

stage is to consider whether on the facts presented before him, there is sufficient evidence to merit the hearing of the defence side of the story. If there is not, the accused would be entitled to an acquittal without having to be called to enter his defence. If on the other hand there is sufficient evidence, the accused would have to be called to enter his defence – and in the event that the accused decides to remain silent it would be incumbent upon the judge to re-evaluate the prosecution's evidence this time with a view to deciding whether the prosecution has proved its case (as it was obliged to under the law) beyond reasonable doubt.

There was an examination afresh of the prosecution evidence at the close of the defence. Just that it was held by the trial court that the ingredients of the charge had been proved beyond doubt, that the defence had failed to cast any reasonable doubt to the prosecution case, and that the guilt of the appellant had been proved beyond all reasonable doubt. And given the facts and circumstances, there was no error. The conviction is not unsatisfactory or unsafe. This was not a case in which the witness's ability to make identification was or could be in doubt, notwithstanding that the identification parade evidence was bad. Guilt had been proved beyond a reasonable doubt. There was no miscarriage of justice.

The appeal against the sentence was not seriously pursued, for learned counsel merely said that the appellant is a first offender, is married and is now a farmer. In any event, the sentence of 30 months' imprisonment is not one that is inappropriate or manifestly excessive (see *Sharif bin Kasmani v. PP* [1997] 275 MLJU 1, where for a similar offence the sentence was two years' imprisonment).

For the reasons herein, this appeal against conviction and sentence is dismissed.